

I. BACKGROUND

The **long-term care (LTC)**[†] industry has grown increasingly concerned in the last few years with problems related to the availability and cost of liability insurance for its facilities. Liability insurance covers the policyholder's legal liability resulting from injuries to other persons or damage to their property. LTC providers, like other businesses, decide whether to carry liability insurance as part of their overall risk management plans.

In the late '90s, a number of highly publicized lawsuits in Florida resulted in high jury awards and settlements. Soon Florida LTC facilities were experiencing sharp increases in their liability premiums. Some insurance carriers (and some nursing home companies) left that State altogether. Providers in other States, including California, began to see significant increases in premiums.

MANDATE

"Ruth Kilduff, Senior Vice President, MARSH, Inc., set the stage for understanding the liability crisis by examining the current climate in long-term care. A confluence of events have led the insurers to reexamine their risks: the fragmentation of families leaving elders alone, the ongoing growth in the numbers of frail Americans, and the growing disparity between the value of caring for our elderly and the pay of those who provide the care. In addition, insurance carriers...missed the boat when they failed to observe the increasing liability risks in long-term care settings; they were insuring real estate values, not liability risk."

—B.C. Ziegler and Company's
Senior Living Finance Group (6/1/01)

Assembly Bill 430, the Health Budget Trailer Bill for 2001-2002, effective July 1, 2001, included a provision for the Department of Health Services (DHS) to convene a workgroup to review the issue of liability insurance coverage for long-term care providers and report its findings to the Legislature (See Appendix B). The report is to address issues relating to the availability and cost of general liability and professional liability insurance for long-term care providers in California.

The term "long-term care provider" or LTC is not defined in the legislation, and Table 1 on page four identifies several definitions. The majority of information on the subject relates

[†] **Bold** is used to indicate the first time a term is used, definitions are provided in Appendix A.

to **Skilled Nursing Facilities (SNFs)**, although liability insurance is an issue for any LTC housing where an element of risk exists.

This report approaches the mandate by reviewing:

- The role of the insurance industry in providing liability insurance to LTC providers;
- Existing data on the availability and cost trends for LTC providers in California;
- The national dialogue regarding availability and cost trends;
- Policy issues affecting the availability and cost trends for general and professional liability insurance;
- Recent actions in other states to address availability and cost of general and professional liability insurance; and
- Potential legislative or administrative options including an assessment of advantages and disadvantages.

The report includes:

Executive Summary.

- I. Background.** The purpose and organization of the materials.
- II. Nursing Homes and the Liability Insurance Market.** Liability insurance options for nursing homes, data on cost and availability of liability insurance and relevant factors affecting the insurance industry.
- III. Quality of Care Oversight and Reimbursement.** Basic regulatory and reimbursement factors affecting the cost and availability of liability insurance for nursing homes.
- IV. Enforcement and Civil Law.** Medical malpractice law, elder abuse law, Medicare/Medicaid fraud and abuse law, and legal enforcement remedies affecting the cost and availability of liability insurance for nursing homes.
- V. Consumer Access to Quality Long-Term Care.** Affect of liability insurance issues on consumers needing LTC services.
- VI. Liability Insurance Issues in Other States.** Legislative and regulatory actions in other states addressing the cost and availability of liability insurance for nursing homes.
- VII. Options for Consideration.** Potential administrative and legislative options for California related to the cost and availability of liability insurance.

VIII. Recommendations.

SOURCES OF DATA

The findings and recommendations presented are based on the following sources:

- Materials submitted upon invitation from identified stakeholders (see Acknowledgements and Appendix C).
- Selected reports and articles that identify or describe the policy and financial issues contributing to current trends (see Appendix D).
- Financial and utilization data on nursing homes from the Office of Statewide Health Planning and Development (OSHPD).
- Information compiled by the California Department of Insurance (CDI), including the results from a data call to determine the availability status of the long-term care “liability” insurance for nursing homes and assisted living facilities in California.
- Data from the Licensing and Certification Program Automated Certification and Licensing Administrative Information System (ACLAIMS) and the federal On-line Survey Certification and Reporting System (OSCAR).
- Medi-Cal Program cost data.

TABLE 1.

DEFINITIONS OF LONG-TERM CARE

A summary list of long-term care “facility” definitions is included below. Data regarding long-term care providers may vary according to the long-term care definition upon which they were based.

Term	Authority	Purpose	Definition
Long-Term Care Facility Services	Federal Medicare/Medicaid 42 Code of Federal Regulations (CFR) Section 447.251	Reimbursement	Nursing Facility (NF) Services (42 CFR 440.155) and Intermediate Care Facility Services for the mentally retarded (ICF/MR). ICF/MR are of varying bed sizes, but basically provide 24 hour care, habilitation, developmental and supportive health services to clients whose primary need is developmental services, and who have a recurring, but intermittent need for skilled nursing services (42 CFR 440.150).
Long-Term Care Health Facilities	State Department of Health Services (DHS) Section 1418 of the Health and Safety (H&S) Code	Health Facility Licensing	Facilities equivalent to federal definition: <ul style="list-style-type: none"> ☞ Skilled Nursing Facility (SNF) or “nursing home” (H&S 1250 (c)) ☞ Intermediate Care Facility (ICF) (H&S 1250 (d)) ☞ General Acute Care Hospital, distinct part SNF (DP/SNF) (H&S 1418) ☞ ICF-Developmentally Disabled (ICF-DD) (H&S 1250 (g)) ☞ ICF-DD Habilitative (ICF-DD-H) (H&S 1250 (e)) ☞ ICF-DD Nursing (ICF-DD-N) (H&S 1250 (h)) Plus <ul style="list-style-type: none"> ☞ Congregate Living Health Facility (CLHF) (H&S 1250 (l)) ☞ Pediatric Day Health Respite Care (PDHRC) Facility (H&S 1760.2) These two types are not eligible for federal funding, except in some Medi-Cal waiver situations.
Residential Care Facilities For The Elderly (RCFE) Assisted Living	State Department of Social Services (DSS) Section 1569.2 (k), H&S Code	Community Care Licensing	Facilities that provide care, supervision and assistance with activities of daily living, such as bathing and grooming. They may also provide incidental medical services under special care plans. These facilities are not eligible for federal Medicare/Medicaid funding, except under the Medi-Cal waiver being developed pursuant to Assembly Bill 499 (Aroner, Chapter 557, St. of 2000)
Continuing Care Retirement Communities (CCRC)	State DSS Section 1771(c)(8), H&S Code	Community Care Licensing	An agreement between a person 60 years or older and a continuing care provider. The contract includes a promise to provide a range of services at a CCRC for a period longer than one year in exchange for payment.